IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1214

P. P. G., INC., a corporation,
and PENELOPE P. PATRICK,

Petitioners,

vs.

CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

ROGER JON DIAMOND
15415 Sunset Boulevard
Pacific Palisades, California 90272
(213) 454-1351

Attorney for Petitioners

Lorraine Mitchell - Legal Briefs
738 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE (213) 747-3631

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Attorney for Petitioners

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PETITION FOR
WRIT OF CERTIORARI

Petitioners P.P.G., INC. and PENELOPE P. PATRICK pray that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the order of the Municipal Court of the Los Angeles Judicial District denying petitioners' pre-trial motion to suppress evidence. The judgment upholding the search and seizure is final under California law and is now controlling under the law of the case doctrine.

PROCEEDINGS BELOW

No written or oral opinions were rendered by the Municipal Court of the Los Angeles Judicial District. The order denying the pre-trial motion to suppress was affirmed by a written decision of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on November 14, 1978. The opinion and judgment of the Appellate Department is reprinted in Appendix A.

Petitioners' timely Petition for Rehearing and Application for Transfer to the Court of Appeal were denied by operation of law on November 29, 1978, when the Appellate Department granted the petitioners' Request for Publication.[1/] The Order Certifying Publication, dated November 29, 1978, is reprinted in Appendix B. The opinion of the Appellate Department is reported at 88 Cal. App. 3d Supp. 12; ___ Cal. Rptr. ___ (1978).

On December 26, 1978, the Court of Appeal of the State of California, Second Appellate District, Division Four, declined to transfer the case. A copy of its Memorandum declining to transfer the case is reprinted in Appendix C.[2/]

[1/] Respondent had also requested the decision to be published.

[2/] Further review in the California Supreme Court is impossible according to California law, even by collateral attack. See In re Sterling, 63 Cal. 2d 486, 47 Cal. Rptr. 205, 407 P. 2d 5 (1965).

JURISDICTION

The date of the judgment sought to be reviewed is November 14, 1978. This Court has jurisdiction under 28 U.S.C. Section 1257(3). The Appellate Department of the Superior Court of the State of California is the highest state court to which an appeal in a misdemeanor case in a Municipal Court can be taken. Further appellate review could only have been had by either (1) the certification by the Appellate Department to the Court of Appeal and acceptance by the Court of Appeal of the certified case or (2) the transfer by the Court of Appeal on its own motion of a published opinion of the Appellate Department. In the instant case the Appellate Department refused to certify the case to the Court of Appeal. It did order its decision to be published, thereby giving the Court of Appeal the authority to order a transfer on its own motion. However, despite petitioners' request that the Court of Appeal transfer the case to itself for further review, the Court of Appeal declined to do so. See Appendix C.

Rules 62 and 63 of the California Rules of Court provide the methods by which cases may be transferred to the Court of Appeal from the Appellate Department of the Superior Court. This Court has reviewed a number of Appellate Department decisions as being from the highest California court. See, e.g. Alberts v. California, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973); Kaplan v. California, 413 U.S. 115 (1973).

Collateral review was not available before the California Supreme Court. See In re Sterling, 63 Cal.2d 486, 47 Cal.Rptr. 205, 407 P.2d 5 (1965). Likewise, collateral review was not available in the federal courts. See Stone v. Powell, 428 U.S. 465 (1976).

The decision of the Appellate Department is final for the purpose of this Court's jurisdiction. While petitioners have not yet been tried, the ruling on their federal constitutional claim is final and conclusive in the California courts. See People v. Shuey, 13 Cal.3d 835, 120 Cal.Rptr. 83, 533 P.2d 211 (1975). Under the authority of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-487 (1975), and cases cited therein, this Court has jurisdiction to review the judgment below. See also Mills v. Alabama, 384 U.S. 214 (1966). Other than the search and seizure issues raised herein, petitioners have no defense to present to the trial court. The admission that the subject film in Roaden v. Kentucky, 413 U.S. 496, 497 (1973) was obscene did not prevent the Court from deciding the search and seizure issue.

QUESTION PRESENTED

Do the search and seizure and the subsequent use in an obscenity trial of business records, purchase order forms, brochures, tax returns, business licenses, postal meter record books, check books, bank statements, deposit tickets, and other items seized from a private home and private business engaged in the distribution of

motion picture films violate the First, Fourth and Fourteenth Amendment rights of the home and business owners being prosecuted for the distribution of one fifteen minute film alleged to be obscene (California Penal Code Section 311.2, a misdemeanor) when the search and seizure are conducted pursuant to a search warrant issued by a judge who refuses to view the film brought to him by the police officer seeking the warrant, the officer having offered to exhibit the film to him in the courthouse, and who instead relies upon the officer's written description of the film?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Penal Code Section 311.2(a) provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or exhibits to others, any obscene matter, is guilty of a misdemeanor."

California Penal Code Section 1538.5 provides, in part, as follows:

> "(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing

> obtained as a result of a search or seizure on either of the following grounds:
>
> ". . .
>
> "(2) The search or seizure with a warrant was unreasonable because . . . (iii) there was not probable cause for the issuance of the warrant . . . (v) there was any other violation of federal or state constitutional standards.
>
> ". . .
>
> "(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure.
>
> ". . .
>
> "(j) . . . If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in

accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. . . ."

The First Amendment provides, in part, as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourth Amendment provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides, in part, as follows:

". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On May 27, 1977 Los Angeles Police Officer Robert E. Peters, who had five years of experience in the field of obscenity, received a brochure in a post office box he maintained under an assumed name. The brochure advertised sexually explicit 8mm films for sale. Officer Peters commenced an obscenity investigation which indicated that petitioners were engaged in a mail order film distribution business at 110 Ivy Avenue, Monrovia, California (the official address of P.P.G., Inc.) and at 465 North Canyon Blvd., Monrovia, California (the private home of petitioner Penelope Patrick, who was the President of P.P.G., Inc.).

As part of his investigation, Officer Peters ordered from petitioners by mail the film "Kinky Kids - Angelic Ass." On October 26, 1977 Officer Peters received from petitioners the film which he ordered. It was mailed to his post office box. He then viewed the film and wrote a description of the film in an affidavit for a search warrant. His affidavit also included a detailed account of his investigation of petitioners' mail order business.

At 8:30 a.m. on October 31, 1977 Officer Peters went to the courtroom of the Honorable Edward L. Davenport, Judge of the Municipal Court of the Los Angeles Judicial District. His court was not in session. Besides the documents relating to the search warrant, Officer Peters took with him into Judge Davenport's courtroom the film here involved. Officer Peters had a projector in his vehicle, parked nearby, ready

for use in the event Judge Davenport wanted to view the film before issuing the warrant.

After reviewing the supporting affidavit of Officer Peters and the search warrant submitted to him, Judge Davenport was asked if he wished to view the film. The affidavit of Officer Peters described in direct and candid frankness the postures, movements, and actions of nude men and women in successive montages of erotica. Judge Davenport declined the offer and signed the search warrant which commanded the executing officer to search certain described automobiles; certain described residences and a certain place of business for property described in the warrant.

The property was described in the search warrant as follows:

> "A. (3) Three copies of the 8mm. film entitled 'Angelic Ass - KK 4.'
>
> "B. Business records including but not limited to brochures, invoices, vouchers, shipping labels, orders schedules, receipts, contracts, agreements, bills, checks, accounts receivable, and payable notes, letters and memorandas, relating to the processing and distribution of the above entitled film.
>
> "C. Rental or ownership agreements, utility and phone bills, which tend to show ownership or control of premises and/or vehicles to be searched."

On October 31, 1977 various police officers conducted a search and seized various items pursuant to the search warrant. The property was seized from 110 North Ivy, Monrovia, California (P.P.G., Inc. warehouse) and from 465 North Canyon Blvd., Monrovia, California (Patrick's home). Among the items seized were a postage meter machine [returned to petitioners by order of the Municipal Court at the hearing on the suppression motion on the grounds that it was not listed in the warrant], an income tax form, order forms for films, other than for the film in question, checkbooks, deposit tickets, bank statements and other records described in the search warrant.

On November 9, 1977 petitioners' attorney wrote a letter to Officer Peters requesting all of the business records and mail and other items seized on October 31, 1977 be returned to petitioners. Officer Peters was advised by the letter that without the records and other matters seized the business could not continue. Officer Peters replied by telephone that if the petitioners wanted their records back they would have to go to court.

Respondent filed a misdemeanor complaint on December 8, 1977 in the Municipal Court of the Los Angeles Judicial District charging petitioners with a violation of California Penal Code Section 311.2 (distribution of obscene film, "Kinky Kids - Angelic Ass"). Petitioners were arraigned in court on the complaint on December 23, 1977 and on January 5, 1978 they filed a motion to suppress and to return the property seized from them on October 31, 1977. Among other things, petitioners contended in their motion that the search

and seizure and use in court of the property seized violated and would violate their First, Fourth, and Fourteenth Amendment rights.

The hearing on the motion was conducted on January 30, 1978 before Judge Jack Newman. Petitioners argued that the judge who issued the search warrant should not have done so without having first viewed the film which was the subject of the search warrant and the subsequent prosecution. At the hearing petitioner testified that the seizure of the business records and other items terminated her motion picture film distribution business. At the conclusion of the hearing Judge Newman upheld the validity of the search warrant but did order the return of the Pitney Bowes postage meter on the ground it was not listed in the warrant.3/ Judge Newman ordered the police to provide copies of all records seized to petitioners.

The trial was continued to permit petitioners to appeal the order denying the motion to suppress. In their appeal petitioners renewed their argument that the search warrant was invalid because the judge who issued the search warrant did not view the film notwithstanding the fact that he had an opportunity to view it and it was feasible for him to do so.

3/ Judge Newman stated had it been listed it could have been properly seized. Other rulings were made which are not relevant to this Petition.

On November 14, 1978 the Appellate Department of the Superior Court rejected petitioners' arguments and affirmed the order of the Municipal Court. Although it refused to grant petitioners' Petition for Rehearing and Application for Transfer to the Court of Appeal, it did, on November 29, 1978 order its opinion to be published, which permitted the Court of Appeal to consider transferring the case to itself for further review.

On December 26, 1978 the Court of Appeal in a Memorandum Order determined not to transfer the case.

The trial court has refrained from setting a trial date until this matter is finally resolved. If certiorari is denied petitioners will have no choice: they will have to plead guilty.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW SPECIFICALLY LEFT UNANSWERED BY THIS COURT IN LEE ART THEATRE V. VIRGINIA, 392 U.S. 636 (1968)

In Marcus v. Search Warrant, 367 U.S. 717 (1961) a Kansas City police officer purchased magazines at five newstands in conjunction with an obscenity investigation he was conducting.

Mr. Justice Brennan, writing for the Court, described the activities further:

> ". . . On October 10 the officer signed and filed six sworn complaints in the Circuit Court of Jackson County, stating in each complaint that 'of his knowledge' the appellant named therein, at its stated place of business, 'kept for the purpose of [sale] . . . obscene . . . publications. . . .' No copy of any magazine on Lieutenant Coughlin's list, or purchased by him at the newsstands, was filed with the complaint or shown to the circuit judge. The circuit judge issued six search warrants . . . ." (Emphasis added.) 367 U.S. at 722.

In invalidating the massiave seizures of magazines pursuant to the search warrants, this Court stated:

> "We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusionary assertions of a single police officer,

> without any scrutiny by the judge of any materials considered by the complainant to be obscene. . . ." (Emphasis added.) 367 U.S. at 731-732.

This Court specifically distinguished Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), which upheld a New York injunctive procedure applicable to obscene matter. The Court in Marcus noted the following characteristic of the New York procedure which saved it from invalidation:

> "First, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene.[27] The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraining took place.

> "27. The feasibility of particularization in complaint and warrant in a case such as the present is apparent, since the publications were sold on newsstands distributing to the public. . . ."

Thus, this Court apparently determined in Marcus that a judge about to issue a search warrant on the basis of alleged obscene matter should examine the matter when it is feasible to do so.

In A Quantity of Books v. Kansas, 378 U.S. 205 (1964), while not agreeing on an opinion for the Court, this Court reversed the judgment of the Supreme Court of Kansas, which had upheld a lower court's order directing the destruction of certain alleged obscene books. Mr. Justice Brennan, writing for himself, the Chief Justice, and Justices White and Goldberg, summarized the Marcus holding:

> ". . . We reversed a judgment directing the destruction of the copies of 100 publications held to be obscene, holding that, even assuming that they were obscene, the procedures leading to their condemnation were constitutionally deficient for lack of safeguards to prevent suppression of non-obscene publications protected by the Constitution."
> 378 U.S. at 210.

The Court's determination in Marcus v. Search Warrant, supra, that a judge about to issue a search warrant based on the alleged obscene nature of specific material must first view the material when it is feasible to do so was recalled by the Court 7 years later in Lee Art Theatre v. Virginia, 392 U.S. 636 (1968). In a per curiam decision, this Court reversed an obscenity conviction where the fims were seized

under the authority of a warrant issued by a justice of the peace on the basis of a police officer's affidavit which stated the titles of the films and that they were obscene based on the officer's personal observations.

The Court noted that it is easier for a judge to read a book in his chambers than it is to arrange to see a motion picture there. The Court then stated it was not necessary to decide whether the justice of the peace should have viewed the film before issuing the warrant.

The instant case presents the issue unresolved by Lee Art Theatre, whether an examination of the film must be conducted when the film is available for viewing in the judge's chambers. Lee Art does not make it clear whether the film must be personally viewed by the judge when there is an affidavit describing the film, as in the instant case. The affidavit was skimpy in Lee Art Theatre.

In considering these cases the Court has been concerned with both the exclusionary rule and the and the Fourth Amendment aspects of the seizures as well as the prior restraint and First Amendment consequences of the seizures. Marcus v. Search Warrant, supra, for example, did not involve a criminal trial. The Court was concerned with the impact upon First Amendment values of the seizure condemned therein.

Lee Art Theatre v. Virginia, supra, on the other hand, involved the use in evidence in a criminal case of a film seized pursuant to a warrant.

Both First and Fourth Amendment values are implicated in the instant case because the seizure of the petitioner's business records and documents resulted in the termination of a business, the activity of which -- motion picture film distribution -- was clearly protected by the First Amendment. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion picture films protected by First Amendment) and First National Bank of Boston v. Bellotti, ___ U.S. ___, 55 L.Ed.2d 707 (1978) (corporations have First Amendment rights). Thus, it really makes no difference for the purpose of First Amendment analysis whether films are seized or whether the means for the distribution of films are seized, as in the instant case. In both situations a prior restraint is imposed.

Of course, petitioners are not claiming in this proceeding damages for a violation of their First Amendment rights resulting from the seizure pursuant to the search warrant issued without benefit of an examination of the alleged obscene film which was available prior to the issuance of the warrant. They only mention the First Amendment insofar as it is relevant to consideration of petitioners' Fourth Amendment claims. In Roaden v. Kentucky, 413 U.S. 496 (1973) this Court specifically held that where a seizure will affect First Amendment conduct the validity of the search and seizure under the Fourth Amendment must be measured against a more strict standard.

In reversing a conviction where the defendant conceded the film was obscene, this Court condemned the search and seizure and stated in the Roaden case:

> ". . . A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. . . ."
>
> " . . .
>
> ". . . The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression. . . ." 413 U.S. at 501-504.

It is interesting to note that on the same day the Court decided Roaden v. Kentucy, supra, it also handed down Heller v. New York, 413 U.S. 483 (1973). In Heller, the Court upheld the search and seizure of a motion picture film at a theatre. The film was seized pursuant to a search warrant issued by a judge who "purchased a ticket and saw the entire film." 413 U.S. at 485. (Emphasis added.)

Petitioners are aware of no Supreme Court decisions upholding the validity of a search and seizure in an obscenity case where the subject material alleged to be obscene was available for viewing and the issuing judge issued a search warrant without viewing the material. This Court has consistently required the judicial officer to "focus searchingly on the question of obscenity." Zurcher v. Stanford Daily, ___ U.S. ___, 56 L.Ed.2d 525, 541 (1978).

The reason the issuing judge should view the material himself and not rely upon a written description of the material is that it is impossible to describe graphic materials in such a way as to permit a judge to make the evaluation required by Miller v. California, 413 U.S. 15, 24 (1973). The film must be considered as a whole. If the film, taken as a whole, has serious artistic value, it cannot be obscene, no matter how patently offensive the sexual conduct is depicted. To make this type of determination, the issuing judge should view the film when it is feasible to do so. Nothing in any case decided by this Court authorizes an issuing judge to refuse to view an available film. Petitioners submit that in conceding the issue is open, they have been charitable. It seems clear the law requires the issuing judge to first view the film when it is readily available.

This case does not present the question as to whether the material must always be examined, irrespective of feasibility. If the film is not available or if the issuing judge could not view the film in his chambers, circumstances not present in the instant case, it may very well be that with a sufficiently detailed affidavit the viewing of the film may not be required. There are some California cases where the search and seizure were upheld despite the lack of a "pre-warrant viewing, but none of those cases[4/] involved the issue squarely

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4/ People v. Haskin, 55 Cal. App. 3d 231 (1970); Monica Theatre v. Municipal Court, 9 Cal. App. 3d 1 (1970), cf. People v. Superior Court (Freeman), 14 Cal. 3d 82 (1975); Flack v. Municipal Court, 66 Cal. 2d 981 (1967).

presented here: whether the issuing judge must view the film when it is feasible and convenient to do so - in the privacy of his own chambers when no emergency exists.

Petitioners submit that "reasonableness" is the pervasive concept underlying the body of search and seizure law developed by this Court. The requirements of the Fourth Amendment have varied from circumstances to circumstance. What the Court has prohibited in one setting it has permitted in another. See, e.g., Chambers v. Maroney, 299 U.S. 42 (1970). In sum, petitioners contend that because it was feasible to do so, the issuing judge should have examined the film. This Court should so declare, and settle an issue specifically unresolved by Lee Art Theatre. The instant case does not require the Court to decide whether there should be any exceptions to the rule petitioners are asking this Court to declare.

This Court recently granted certiorari in Lo-Ji Sales, Inc. v. New York (No. 78-511; cert. granted November 27, 1978, 47 U.S.L.W. 3368) to consider a similar issue: "Did judge's brief and incomplete perusal of books, magazines, and films enable him to focus searchingly upon obscenity of each work as whole and thus constitute sufficient prior judicial scrutiny to warrant seizure?" 47 U.S.L.W. 3305 (1978). Granting certiorari in the instant case will permit this Court to explore the issue further.

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court to grant this Petition For Writ of Certiorari.

Respectfully submitted,

ROGER JON DIAMIND

Attorney for Petitioners

APPENDIX A

FILED
Nov. 14 1978
John J. Corcoran, County Clerk
/s/ E. Wallin
By E. Wallin, Deputy

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. P.P.G., INC. and PENELOPE P. PATRICK, Defendants and Appellants.	Superior Court No. CR A 16358 Municipal Court of the Los Angeles Judicial District No. 31585123 OPINION AND JUDGMENT

Appeal by defendants from order of the Municipal Court.

Jack M. Newman, Judge.

Order is affirmed.

For Appellants - Hecht & Diamond
By Roger Jon Diamond

For Respondent - Burt Pines, City Attorney
Laurie Harris, Deputy City Attorney
By Maureen R. Siegel, Deputy City Attorney

-oOo-

Appeal by defendants from an order denying their motion to suppress. (Penal Code section 1538.5) The defendants were charged with violating Penal Code section 311.2 (distributing obscene material). After pleas of not guilty were entered, a motion to suppress was made and denied. The trial date was continued and the appeal from the order denying suppression followed.

The appeal is on a Settled Statement on Appeal, minute entries in the certified court docket, the search warrant and the affidavit in support thereof.

STATEMENT OF THE FACTS

Robert E. Peters was an officer in the City of Los Angeles assigned to "Administrative Vice." In the five years of this assignment he participated in approximately 100 obscenity investigations. He maintained a post office box at the Hollywood Post Office under the assumed name of "David Allen." On May 27, 1977 he found in his post office box an envelope addressed to him under his assumed name. It contained a brochure of sexually explicit 8 mm films available at stated prices. The envelope bore the following return address, "P.P.G., 110 Ivy Avenue, Monrovia, California." Officer Peters

did not solicit the brochure.

After receiving the brochure, Officer Peters began an obscenity investigation which is described, in detail, in his affidavit in support of a search warrant. He also responded to the brochure by ordering a film entitled, "Kinky Kids - Angelic Ass." On October 26, 1977 he received a package addressed to him under his assumed name at the Hollywood Post Office. The package bore the same return address and it contained a motion picture film entitled "Kinky Kids."

Officer Peters viewed the picture film which he had received to prepare his affidavit in support of the issuance of a search warrant. In this affidavit he described the scenes depicted in the film; he also gave an account of his investigation concerning its probable distributors. His affidavit was 18 pages in length. This affidavit and the search warrant issued responsive thereto, are part of the record before us.

At approximately 8:30 in the morning of October 31, 1977, Officer Peters went to the courtroom of the Honorable Edward L. Davenport, Judge of the Municipal Court of the Los Angeles Judicial District. His court was not in session. Besides the documents relating to the search warrant, Officer Peters took with him into Judge Davenport's courtroom the film here involved. Officer Peters had a projector in his vehicle, parked nearby, ready for use in the event Judge Davenport wanted to view the film before issuing the warrant.

After reviewing the supporting affidavit of Officer Peters and the search warrant submitted to him, Judge Davenport was asked if he wished to view the film.[1] He declined the offer and signed the search warrant which was directed as follows:

> ". . . TO ANY SHERIFF, CONSTABLE, MARSHAL, POLICE OFFICER, OR ANY OTHER PEACE OFFICER IN THE COUNTY OF LOS ANGELES:"

The search warrant commanded the executing officer to search certain described automobiles, certain described residences and a certain place of business for property described in the warrant.[2]

1/ Hereinafter all references to the "film" will be to the motion picture film, the subject of this proseuction, and which was entitled, "Kinky Kids - 4 (Angelic Ass)"

The scenes in the film were described in the affidavit of Officer Peters. The postures, movements, actions of nude men and women in successive montages of erotica were described in direct and candid frankness.

2/ The property was described in the search warrant as follows:

> "A. (3) Three copies of the 8mm. film entitled 'Angelic Ass - KK4'.
>
> B. Business records including but not limited to brochures, invoices,

(continued on p. A-5)

With the warrant in hand, Officer Peters went to the police department of the City of Monrovia. The City of Monrovia is located within the Santa Anita Municipal Judicial District. Officer Peters informed a police officer on duty at the Monrovia Police Department of his intention to conduct a search of the premises described in the search warrant.

A search was conducted at various locations in Monrovia by members of the Los Angeles Police Department under the supervision of Officer Peters. No officer of the Monrovia Police Department nor any officer of the Sheriff's Department of Los Angeles County participated in the search.

2/ (continued from previous page)

> vouchers, shipping labels, orders schedules, receipts, contracts, agreements, bills, checks, accounts receivable, and payable notes, letters and memorandas, relating to the processing and distribution of the above entitled film.
>
> C. Rental or ownership agreements, utility and phone bills, which tend to show ownership or control of premises and/or vehicles to be searched."

A number of items[3] were seized from the various locations in Monrovia. On November 9, 1977 defendants' attorney wrote a letter to Officer Peters requesting all of the business records and mail and other items seized on October 31, 1977 be returned to defendants.

On December 8, 1977 a complaint was filed against the defendants in the Municipal Court of the Los Angeles Judicial District charging the defendants with violation of Penal Code section 311.2. Following an entry of a plea of not guilty, and on January 30, 1978 defendants' motion to suppress was heard and denied. This appeal followed.

DISCUSSION

The defendants urge that the order denying their motion to suppress should be reversed. Three principal grounds for the reversal are urged. These will be considered seriatim:

3/ Among the items seized were a postage meter machine, [return to the defendants by order of the court at the hearing on the suppression motion on the grounds that it was not listed in the warrant], an income tax form, order forms for films, other than for the film in question, checkbooks, deposit tickets, bank statements and other records described in the search warrant].

I

WAS THE SEARCH INVALID BECAUSE: (A) IT WAS ISSUED BY A MAGISTRATE OF LOS ANGELES JUDICIAL DISTRICT AND NOT BY A MAGISTRATE OF THE SANTA ANITA JUDICIAL DISTRICT WHERE THE SEIZED PROPERTY WAS LOCATED, AND, (B) WAS THE WARRANT PROPERLY EXECUTED AS PRESCRIBED BY LAW?

A. THE ISSUANCE OF THE WARRANT

The first prong of defendants' argument is that the magistrate had no authority to issue a search warrant for execution outside of his judicial district. The argument is based upon the assertion that Penal Code section 830.1[4] applies as to

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4/ §830.1. Sheriffs, police, marshals, constables, inspectors and investigators of district attorneys

Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, any policeman of a district authorized by statute to maintain a police department, any marshal or deputy marshal of a municipal court, any constable or deputy constable, regularly employed and paid as such, of a judicial district, or any inspector or investigator regularly employed and paid as such in the office of a district attorney, is a peace officer. The authority of any such peace officer extends to any place in the state:

(continued on p. A-8)

the issuance of a search warrant as it does to its execution. One of the purposes of this section, defendants assert, is to avoid any inadvertent confrontations between police officers, some of whom are often dressed in plain clothes.

The statutory provisions relating to the issuance of warrants is found in Chapter 3, Title 12, Part 2 of the Penal Code entitled "Search Warrant." It includes sections 1523 through 1542. Authority to issue warrants is given to magistrates. (Penal Code section 807) Certain persons are designated as magistrates, included

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4/ (continued from previous page)

(a) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him; or

(b) Where he has the prior consent of the chief of police, or person authorized by him to give such consent, if the place is within a city or of the sheriff, or person authorized by him to give such consent, if the place is within a county; or

(c) As to any public offense committed or which there is probable cause to believe has been committed in his presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of such offense.
(Added by Stats. 1968, c. 1222, §1. Amended by Stats. 1977, c. 220, §1.)

among them are judges of the municipal court. (Penal Code section 808) From the Penal Code sections referred to the legislative intent seems clear, namely, the jurisdiction of magistrates, acting in that capacity, is statewide. It follows that a search warrant or warrant of arrest issued by any magistrate, otherwise proper, is viable throughout the state. It has been held, "When a judge of a particular judicial district[5] acts in the

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5/ "The action taken by a judge of an inferior court who has issued the order for arrest or before whom an arrested person is brought after an arrest without a warrant, is not action by a judge of any court. It is action by a magistrate as incumbent of a distinct and statutory office. (People v. Cohen, 118 Cal. 74, 78 [50 P. 20]; People v. Brite, 9 Cal.2d 666, 685 [72 P.2d 122]; People v. Storke, 39 Cal.App. 633, 636 [179 P. 527]; People v. Velarde, 59 Cal. 457.)" (Wells v. Justice Court, supra, 181 Cal.App. 2d 221, 224-225; accord, People v. Randall, supra, 35 Cal.App.3d 972, 975.)

"Justices of the supreme court, judges of the superior court, justices of the peace and police judges, when sitting as magistrates, have the jurisdiction and powers conferred by law upon magistrates, and not those which pertain to their respective judicial offices. They drive their powers and jurisdiction from the constitution, operating with the acts of the

(continued on p. A-10)

capacity of a magistrate, he does not do so as a judge of a particular court but rather as one who derives his powers from the provisions of the Penal Code sections 807 and 808." (Koski v. James [1975] 47 Cal. App. 3d 349, 355)

Neither People v. Ruster [1976] 16 Cal. 3d 690 nor People v. Grant [1969] 1 Cal. App. 3d 563, cited by defendants, are pertinent. In both cases the validity of the warrant issued in one county and executed in another was involved. In both cases the validity of the warrants, and the arrests made thereunder, were upheld on the ground that the officers were in pursuit of the subjects as they crossed the county line.

We find the contention of the defendants that the warrant issued by Judge Davenport. Judge of the Municipal Court of the Los Angeles Judicial District, in his capacity as magistrate, lacked validity within the adjoining Santa Anita Judicial District, is devoid of merit.

5/ (continued from previous page)

legislature upon the subject." (People v. Crespi (1896) 115 Cal. 50, 54 [46 P. 863]; accord, People v. Randall, supra, 35 Cal. App. 3d 972.)" Koski v. James, supra, p. 355.

B. EXECUTION OF THE WARRANT

Even if the warrant had validity outside of the judicial district where it was issued, it was not executed in the manner prescribed by Penal Code section 830.1, defendants argue. Defendants assert that subsection (b) of this section (see footnote 4, supra), was not complied with in that Officer Peters did not obtain consent to execute the search warrant from the Chief of Police of Monrovia, or a person authorized by him.

The warrant was executed in accordance with the formalities prescribed by Penal Code section 1529 and was issued to "any sheriff, constable or policeman." Officer Peters, under the terms of the warrant, was authorized to execute the warrant. (Penal Code section 1530)

Penal Code section 830.1 provides, in pertinent part, "The authority of any such peace officer extends to any place in the state." This is followed by three subparagraphs separated by the disjunctive "or." Subparagraph (a) of this section reads as follows:

> "(a) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him; or . . ."

There was probable cause for Officer Peters to believe that an offense, the one in question, had been committed in the "political subdivision which employ[ed] him." His authority to execute the warrant in Monrovia was granted to him by

subsection (a) quoted above and not by subsection (b) of Penal Code section 830.1 as contended by defendants. This difference in the two subsections was noted in People v. Pina [1977] 72 Cal. App. 3d Supp. 35, 37 cited by defendants.

This contention of the defendants is, likewise, lacking in merit. In sum, we find that the warrant was viable and was executed properly.

II

WAS THE WARRANT INVALID BECAUSE THE MAGISTRATE DID NOT VIEW THE FILM?

Defendants' second argument is that the warrant was issued without probable cause for the reason that the magistrate failed to view the film, having an opportunity to do so, before issuing the warrant. The film itself was the best evidence of its contents, defendants argue, citing People v. Enskat [1971] 20 Cal. App. 3d Supp. 1, where a Best Evidence objection in an obscenity case was erroneously overruled, the opinion stating that the film itself, rather than an affidavit as to its contents, is the best evidence of what it portrays. Defendants also argue that because First Amendment rights are involved the issuance of a search warrant is not to be measured by the same standards governing the seizure of contraband or other evidence, citing Roaden v. Kentucky [1973] 413 U.S. 496, 37 L. Ed. 2d 757 and People v. Superior Court (Freeman) [1975] 14 Cal. 3d 82.

The People rely on People v. Haskin [1976] 55 Cal. App. 3d 231, 236 and on Monica Theater v. Municipal Court [1970] 9 Cal. App. 3d 1 which hold that it is not a requirement of probable cause that the magistrate view the film before issuing a warrant. The defendants reply by stating that in both cases it was not "feasible," as it was in the instant case, for the magistrate to view the film before issuing the warrant. The defendants cite People v. De Renzy [1969] 275 Cal. App. 2d 380, 387-388 for a recital of the problems arising if a magistrate were required to go to a theatre for the purpose of viewing the film. Such problems were not present in the instant case state the defendants; Monica Theatre, supra, argues the defendant, was decided on the issue of the "feasibility" of the magistrate viewing the film; this issue was not present in the instant case, defendants assert. We find the defendants' contentions in this regard also without merit.

After considering the supporting affidavit of Officer Peters, the magistrate made an implied determination of fact, namely that the affidavit was sufficient to establish probable cause and that viewing the film would be cumulative. (Evidence Code section 352) We conclude that the affidavit supports the magistrate's conclusion of probable cause. (Theodor v. Superior Court [1972] 8 Cal. 3d 77, 101)

III
WAS THE WARRANT OVERBROAD
IN ITS SCOPE?

The third and final contention of defendants is that the warrant was overbroad, that it permitted "unlimited search" in violation of defendants' rights. (Aday v. Superior Court [1961] 55 Cal. 2d 789, 796; Stanford v. Texas [1965] 379 U.S. 476)

The criteria for determining whether a search warrant meets the requirements of specificity set forth in Penal Code section 1525 is ". . . whether the warrant places a meaningful restriction on the objects to be seized. (citations omitted)" People v. McEwen [1966] 244 Cal. App. 2d 534, 536.

It is apparent from reading of the items in the search warrant, order to be seized, that each item related specifically either to evidence of distribution of the film or to evidence of ownership and control of the specified premises.

The order is affirmed.

/s/ Ibanez
Judge

We concur.

/s/ Pacht
Acting Presiding Judge

/s/ Bigelow
Judge

APPENDIX B

FILED
Nov 29 1978
John J. Corcoran, County Clerk
L. Swartz
Deputy

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. P.P.G., INC. and PENELOPE P. PATRICK, Defendants and Appellants.	Superior Court No. CR A 16358 Municipal Court of the Los Angeles Judicial District No. 31585123 ORDER CERTIFYING PUBLICATION

We certify that the foregoing opinion qualifies for publication in the official reports under California Rules of Court, Rule 976(b) in that it involves a legal issue of continuing public interest.

/s/ Pacht
Acting Presiding Judge

/s/ Bigelow
Judge

/s/ Ibanez
Judge

APPENDIX C

Court of Appeal-Second Dist.
F I L E D
Dec 26 1978
Clay Robbins, Jr. Clerk

Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,	)	Crim. No. 33808
	)	(Superior Ct. No.
Plaintiff and	)	CR A 16358;
Respondent,	)	Municipal Ct. No.
vs.	)	31585123)
	)	
P.P.G., et al.,	)	MEMORANDUM
	)	
Defendants and	)	
Appellants.	)	
	)	

THE COURT:*

The opinion of the Appellate Department of the Superior Court of Los Angeles County, which was filed on November 14, 1978, and certified for publication on November 29, 1978, was examined by this court together with the letter of the city attorney to Judge Cole dated November 17, 1978, and the letter of Roger Jon Diamond to Justice Files

*FILES, P.J., JEFFERSON (Bernard), J., ALARCON, JR.

dated December 6, 1978, within 30 days after the decision of the appellate department became final; and this court determined that transfer under rule 62 (a), California Rules of Court, was not necessary.